APPENDIX

Opinion, Judgment and Dissenting Opinion of Court of Appeals

In the Matter of the Estate of MARCEL J. ROUGERON, Deceased. JULES J. ROUGERON, Appellant; JEANNE A. ROUGERON, Respondent.

Decided May 5, 1966.

Chief Judge DESMOND. Petitioner-appellant, born in France in 1903 and a life-long citizen and resident of that country, was an acknowledged illegitimate son of Marcel J. Rougeron, a native of France, born in 1875, who became an American citizen in 1926 and who died in Switzerland on April 15, 1954, leaving a will which gave his entire estate to his widow, the respondent herein, who was of French birth and whom the deceased had married in Chicago in 1937 and who is now about 86 years old. Just before his death the testator had been living in a home he owned in a Swiss village in the Canton of Geneva. The Appellate Division order which is on appeal here affirmed a denial by the New York County Surrogate's Court of petitioner's 1961 application to vacate or reopen the 1957 decree of that court admitting the will to probate and to vacate or reopen a 1958 decree which had settled the account of the administrator *c. t. a.* and had directed distribution of the net estate to respondent widow.

Summarized, appellant's position is this: that because at death decedent had personal property in his possession in Switzerland (besides other personalty in New York City) the succession thereto is by a Swiss-United States treaty of 1850 hereafter discussed, to be decided by the Swiss courts according to Swiss law, that the New York courts, therefore, had no subject-matter jurisdiction, that under Swiss law petitioner would be entitled to a statutory share (a little more than half) of that property, and that the New York courts had no right to assume jurisdiction as to the property which was actually in Switzerland at

the time of death and had its situs there but was soon afterwards brought to New York by the widow who then commenced the probate proceedings in New York. While conceding that he took part in the New York probate proceedings and litigated the question of domicile there decided against him, petitioner argues that the New York outcome is not conclusive against him since, so he asserts, neither petitioner nor the Surrogate knew at that time that decedent held property in Switzerland which, as petitioner reads the treaty, had to be administered by the Swiss courts according to Swiss law. Petitioner points out that he was not made a party to the accounting proceedings, presumably because on probate he had already been barred from any share in the estate.

A summary of respondent's position is: that the 1957 probate decree is conclusive against any claim of petitioner since he was cited and appeared in that proceeding and filed objections to the assumption of jurisdiction by the New York County Surrogate's Court, the ground of petitioner's objections at that time being his assertion that decedent had been domiciled in Switzerland, not New York, and that the treaty protected petitioner's right of inheritance. Respondent argues, therefore, not only that petitioner's alleged rights were defeated by the probate decree, but that petitioner had no such rights since, as respondent reads it, the Swiss-American treaty applies Swiss law to personal property of Swiss domiciliaries or nationals only and that, in fact and as determined by the probate decree, decedent was a United States citizen sojourning in Switzerland to whose personalty, wherever situated, Swiss law did not apply under the treaty or otherwise.

Before going to other law questions presented, we must pass on questions as to our jurisdiction over this appeal. Petitioner's appeal from so much of the order below as refused to vacate the probate must be dismissed for nonfinality. However, the other part of the order appealed

from (the part denying vacatur of the settlement of the account) is final and appealable as to petitioner since he had not been made a party to the accounting proceeding (Cohen and Karger, Powers of the New York Court of Appeals, p. 188). Also, the appeal can lie from that latter part of the order although it is from a unanimous affirmance, since there is a constitutional question raised by petitioner's arguments as to the treaty (*Matter of Rougeron*, 16 N.Y. 2d 882).

The Surrogate's decision which denied vacatur of the two decrees did not involve any consideration of the treaty or of proceedings in the Swiss courts now to be discussed herein. The Surrogate held that, since the probate decree which expressly barred petitioner from participation in the estate had become final without appeal, petitioner was incapable of objecting to the final account and order of distribution.

But petitioner calls attention to court proceedings and orders and judgments in Switzerland. Two weeks after her husband's death the widow and a notary filed in the appropriate Geneva tribunal an inventory of her husband's estate. This document described the decedent as having been domiciled in Geneva and listed, as his assets located in Switzerland at his death, cash and various corporate stocks, also mentioning that decedent had deposit accounts in several New York banks. Four months later the widow (again ex parte) obtained from a Swiss court (Justice of the Peace) a "preliminary Certificate of Heirship" certifying that the widow was the sole heir of decedent and of his whole estate. Although the issue is not fully briefed, it seems undisputed that the Swiss certificate would ordinarily stand in Switzerland as evidencing a "common" or "simple" form of probate, to stand unless and until a formal contest should be filed (see 95 C.J.S., Wills, § 318). In January, 1955 petitioner in a Swiss court asked for a sequestration order which was granted, but an appellate

court reversed and denied relief, apparently because of lack of jurisdiction in the Swiss tribunals. In April, 1955 the widow filed in New York the probate petition above described and which resulted in a decree made after a trial that petitioner had no interest in the estate. Meanwhile as we have said, the property which decedent had with him in Switzerland when he died had been removed by the widow to New York, several months after death.

After petitioner's first Swiss lawsuit had failed he commenced (before the New York probate) another action or proceeding in a Swiss court which was decided against him on the merits in April, 1958. On appeal, however, he was successful, obtaining in November, 1958 a decree of the Court of Appeals of Geneva which adjudged that the estate was under the treaty governed by the Swiss law, and that the Swiss courts have exclusive jurisdiction as to any dispute arising in the estate. This decree granted petitioner a "statutory compulsory share" (apparently 9/16ths) in the estate and ordered the widow to pay him that share and to furnish him full information as to the property in the estate. This Swiss decree included a declaration that "the concept of domicile must be determined in accordance with the lex fori", that is to say in accordance with Swiss law and not in accordance with American concepts, and a finding that "deceased at the time of his death was actually domiciled in Geneva".

Petitioner's sole reliance is on the Swiss-United States treaty of 1850 and its article VI which reads: "Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated." This language, argues petitioner, requires us to hold that the personal assets of deceased, which were in Switzerland when he died, must be distributed according to Swiss law, even though deceased was a United States citizen and even though it has been held by a Surrogate's decree handed down after

a contest in which petitioner took part, and not appealed from, that deceased was a New York domiciliary.

Respondent, while disagreeing with petitioner as to the meaning and applicability of the treaty (and calling to our attention that petitioner pleaded this same treaty as a basis for relief to him in the probate proceedings), takes her stand firmly on the proposition that the unappealed New York Surrogate's decree directing probate of the will on a finding after testimony taken that decedent had his domicile in New York is a complete bar to any demand or claim of petitioner (*Cromwell* v. *County of Sac*, 94 U.S. 351, 353; *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 306; *Ripley* v. *Storer*, 309 N.Y. 506, 515). And, respondent points out, this applies generally as against attempts to relitigate jurisdictional questions as well as other kinds of issues (*Baldwin* v. *Traveling Men's Assn.*, 283 U.S. 522, 525; *Davis* v. *Davis*, 305 U.S. 32; *Williams* v. *North Carolina*, 325 U.S. 226, 230; see *Vander* v. *Casperson*, 12 N.Y. 2d 56). But the meaning and application of a treaty is still a question of law which if decided erroneously must be reviewed on appeal, otherwise the judgment is conclusive.

It is the rule that subject-matter jurisdiction otherwise nonexistent may not come into being through waiver or estoppel (*Matter of Newham* v. *Chile Exploration Co.*, 232 N.Y. 37). However, there is a well-settled exception or proviso that this does not apply when the court had jurisdiction of the general subject matter but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case (*Moore* v. *McAllister*, 216 Md. 497; *Taylor Coal Co.* v. *Industrial Comm.*, 301 Ill. 381; *Lambert* v. *Yellowley*, 4 F. 2d 915; *United States* v. *Ellison*, 74 F. 2d 864). In other words the rule that subject-matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a

tribunal vested with civil competence attempts to convict a citizen of a crime. In other words, "subject matter" does not mean "this case" but "this kind of case" (cf. *Matter of Newham* v. *Chile Exploration Co.*, 232 N.Y. 37, 42, *supra*). The Surrogate's Court of New York County had general subject-matter jurisdiction as to probate of wills and as to the probate of the will of this decedent who had a residence in New York and property there. Petitioner never really took a position different from this in the Surrogate's Court (he asked the court to rule that the will was "invalid") although he now tardily asserts that the Surrogate's jurisdiction extended only to entering an order against the respondent and directing her to return the property to Switzerland and to the Swiss courts. The petitioner seems to be arguing also that he should not be charged with estoppel or waiver because, so he intimates, he did not know that valuable property of the estate had been taken from Switzerland to New York. The record before us, however, proves conclusively that petitioner did know this fact at the time of this New York probate.

We turn to the treaty and petitioner's argument that article VI is to be taken with all literalness when it says that: "Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated." Petitioner says that this means that a controversy like the present one must be decided not only according to the laws of Switzerland but by the courts of Switzerland. The only known writings on the subject, four in number, all say in one way or another that the language of article VI does not require that questions as to succession or inheritance must be decided pursuant to the law and by the judges of the country (Switzerland or the United States) in which personal property happens to be physically located at the moment of death (*Matter of Schneider*, 198 Misc. 1017; Nussbaum, American-Swiss Private International Law, 47

Col. L. Rev. 186, 195 *et seq.*; Vanderbilt L. Rev., Vol. 6, pp. 729-730; Miller, Treaties and Other International Acts of the United States of America, published by the United States Department of State, Vol. 5, Discussion of art. VI at p. 869). All these in one way or another confirm that as to personal property legal domicile at death determines what law is to be applied and what court has jurisdiction. Particularly interesting is Miller's work which is an official publication of the United States Department of State. Author Miller has given us a complete history of the 1850 treaty. Material at page 869 of his Volume 5 shows that it was recognized during the treaty negotiations that a literal application of article VI would produce the absurd and undesired effect that if a decedent to whose estate the treaty applied left personal property in both Switzerland and the United States proceedings would be required in both countries with obvious difficulty, delay and expense. As a result of these comments and discussions between the diplomatic representatives of the two countries, narrated by author Miller, the treaty's language was not changed but there was apparent recognition that the only proper interpretation was that jurisdiction would be in the courts and place of the decedent's legal domicile. Furthermore, as appears from the Miller text, an earlier draft of article VI specified that the article would apply to both real and personal property, but this was stricken out. The deletion apparently was made because it was recognized that jurisdiction was not to be reposed solely in the courts of the place where the property was physically present (Miller, *op. cit.*, vol. 5, pp. 892-893, 899-903). Thus, when petitioner came into and took part in the New York County probate proceedings he himself was recognizing the application under the treaty of the conventional domiciliary rule as to personal property.

That part of the order appealed from which affirms the denial of the application to vacate the probate should be

dismissed for nonfinality, otherwise the order appealed from should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). This is an unusual situation, where the Swiss courts have decided that the decedent was domiciled in Switzerland, and the New York Surrogate's Court that he was domiciled in this country. As an acknowledged illegitimate son, appellant would be entitled to inherit under Swiss law; contrariwise under the law of New York State. It has been held that appellant is estopped by the order of the Surrogate admitting the will to probate in New York County, on the basis that the deceased was a New York State domiciliary when he died. Appellant appeared and contested the probate on the ground that decedent had been domiciled in Switzerland and not in New York. He was held not to be a party in interest, and was not thereafter cited when it came to the executor's accounting and the distribution of the assets. Insofar as concerns assets having a situs in New York State at the time of death, I have no question that the decision is correct. Upon the other hand, there is something wrong about the disposition of the Swiss assets, which were obtained by the widow in Switzerland as a result of Swiss legal proceedings, and were then brought by her to New York after her husband's death. If they had been left in Switzerland, they would have been distributed in accordance with the Swiss decree so that the son would have inherited his share under Swiss law. There is something wrong about allowing the widow to take the law into her own hands so as to change the devolution of this property by taking possession of it in Switzerland, under Swiss legal process, and then removing it to the United States thus thwarting its disposal by the Swiss courts under Swiss law. The decedent has been held by the Swiss courts to have been domiciled there, not here, and fairness and reason require a determination either that the Surrogate lacked jurisdiction to dispose of them, or that the Surrogate should be required to remit them to Switzerland to be

disposed of under the Swiss decree. The situs of investment securities has been held to be a factor of determinative importance (*Wyatt* v. *Fulrath*, 16 N.Y. 2d 169), and the widow should not be allowed unilaterally to decide the choice of law by leaving the securities in Switzerland or bringing them to the United States, and thus to determine whether they are to be distributed under the conflicting Swiss or New York decrees. Appellant is not estopped by the admittance of the will to probate in New York, inasmuch as it might very well be admitted here to dispose of the New York assets. But a suitable respect for the decrees of other civilized countries would not empower the New York County Surrogate to dispose of assets which would be distributed under the Swiss decree except for the fact that the widow has changed their situs to this country to suit her own advantage. Appellant was not a party to the judicial settlement proceedings, and no one contends that he is estopped by the decree of distribution. The order appealed from ought to be reversed or, at least, modified so as to return the Swiss assets to Switzerland, where they were when decedent died, to be administered in that jurisdiction.

Judges Fuld, Burke and Bergan concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion in which Judges Scileppi and Keating concur.

Appeal from order, insofar as it affirms the order denying the application to vacate the probate decree, dismissed for non-finality; in all other respects, order affirmed, with costs.

Notice of Appeal to the Court of Appeals

SURROGATE'S COURT OF THE COUNTY OF NEW YORK

File No. P1396-1955

In the Matter of the Application to Open, Vacate and Set Aside a Decree of this Court Granting Letters of Administration with the Will Annexed on the Estate of Marcel J. Rougeron, Deceased.

JULES JEAN ROUGERON, *Petitioner-Appellant,*

v.

JEANNE A. ROUGERON, *Respondent-Respondent.*

NOTICE OF APPEAL TO THE COURT OF APPEALS

Sirs:

PLEASE TAKE NOTICE that the Petitioner-Appellant above named, hereby appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of the said Appellate Division on the 8th day of July, 1965, which unanimously affirmed the judgment of the Surrogate's Court of the County of New York in the above entitled proceeding, entered in the office of the Clerk of the Surrogate's Court on the 28th day of May, 1963, which denied Petitioner's Petition to set aside, open and vacate a decree of December 2, 1958 settling the account of the administrator c.t.a. and the Petitioner appeals from each and every part of the said Order of the Appellate Division, as well as from the whole thereof.

Petitioner-Appellant claims the right to appeal as of right under sub-division 1(a) of C.P.L.R. § 5601, by rea-

son of the fact that the order of the Appellate Division finally determined a proceeding in which there is directly involved the construction of the Constitution of the United States as follows:—

(a) The impact of the Swiss-United States treaty of 1850 and the Supremacy Clause (Art. VI clause 2) of the Constitution upon the jurisdiction over the subject matter of the Surrogate's Court to administer and distribute the assets of a decedent which were in Switzerland on date of death and which were physically removed from Switzerland to New York for administration after his death.

(b) If the Surrogate's Court has such jurisdiction, the impact of the treaty and the Supremacy Clause upon the choice of the law to be applied by the Surrogate (i.e., the law of New York or the law of Switzerland) in the distribution of the assets of the decedent which were in Switzerland on date of death and which were physically removed from Switzerland to New York for administration after his death.

(c) The impact of the constitutional doctrine of *Pink* v. *United States,* 315 U.S. 203 (1941) upon the adjudication by the courts of this State of questions of foreign law on which the federal rights under the treaty and the Supremacy clause may depend.

(d) The power of the Surrogate's Court to ignore the Treaty and its provisions for jurisdiction over the subject matter and choice of law by the invocation of local New York rules of procedure, e.g., the alleged existence of res judicata, and thereby to create jurisdiction over the subject matter and to choose New

York law rather than Swiss law in violation of the treaty and the Supremacy Clause.

Dated: New York, N.Y.
August 3, 1965

Yours, etc.

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To:

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New York, New York

Kelley, Drye, Newhall, Maginnes & Warren, Esqs.
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PL 2-5800

Attorneys for Respondent-Respondent

Order of Affirmance of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 8th day of July, 1965.

Present:

Hon. Charles D. Breitel,
Justice Presiding,
" Benjamin J. Rabin,
" James B. M. McNally,
" Harold A. Stevens,
" Samuel W. Eager,
Justices.

9038, 9039, 9040.

In the Matter

of

The Application to open, vacate and set aside a decree of this Court granting letters of administration with the Will annexed on the Estate of Marcel J. Rougeron, Deceased.

Jules Jean Rougeron, *Petitioner-Appellant,*

v.

Jeanne A. Rougeron, *Respondent-Respondent.*

An appeal having been taken to this Court by the petitioner-appellant from an order of the Surrogate's Court, New York County, entered on the 28th day of May, 1963, denying petitioner's application to vacate or reopen the decree granting probate, the order dismissing objections and the decree settling account of the Administrator, C.T.A., and said appeal having been argued by Mr. Philip W. Amram of counsel for the appellant, and by Mr. Bud G. Holman of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $30 costs and disbursements to the respondent.

Enter:

s/ FRANK H. CRABTREE
Clerk

Statement of Questions Involved in the Appellate Division

(1) Should a Surrogate open a decree of distribution under the following facts? A United States citizen, domiciled in New York, dies in Switzerland, having substantial personal property with its situs in that country. His widow initiates administration of the Swiss property in the Swiss courts. While these proceedings are pending, the widow physically removes the property from Switzerland to New York and presents it to a New York Surrogate's Court for administration, without disclosure of the Swiss situs on the date of death or of the removal of the properties to the United States while the Swiss proceedings were pending. The Swiss Court of last resort later enters its final decree of devolution and distribution of the property under Swiss law, awarding part of it to the widow and part to another beneficiary. Thereafter, the widow, without disclosure of the then existing Swiss final decree and giving no notice to the other beneficiary, secures from the New York court an independent decree of devolution and distribution under New York law of the assets which had a Swiss situs on date of death, entirely in her own favor, and totally different from the earlier Swiss decree. The court below declined to answer this question.

(2) Under the facts set forth in (1) above:

(a) Under the Swiss-United States Treaty of 1850 has the Surrogate's Court in New York any competence or jurisdiction whatever to administer or dis-

tribute the assets of the decedent, which had their situs in Switzerland on date of decedent's death and which were brought to New York after death?

(b) If the New York courts have any competence or jurisdiction under the Treaty, may they distribute such assets under any law other than Swiss law?

(c) If the New York courts have any competence or jurisdiction under the Treaty, may they distribute such assets in a manner contrary to a pre-existing and outstanding final judgment of the court of last resort of Switzerland, which specifically distributes this particular property?

(d) Is a decree of the New York courts, awarding and distributing the Swiss assets contrary to Swiss law and contrary to the pre-existing and outstanding judgment of the court of last resort of Switzerland, void on constitutional grounds, as a violation of the Treaty and the law of the land?

The court below declined to answer any part of this question.

(3) Was the decree of the Surrogate of May 16, 1957, in this estate, granting letters of administration and adjudicating that appellant herein had no interest in the New York assets of this estate under New York law and therefore no right to object to probate, *res judicata* of the right of the appellant, under the Swiss-United States Treaty of 1850, to share in the distribution of the assets of the estate which had their situs in Switzerland on date of death and which were removed to New York after the decedent's death? Answered "yes" by the court below.

Decision and Opinion by DiFalco, S.

New York Law Journal—February 4, 1963

SURROGATE'S COURT.

By Mr. Surrogate DiFalco.

Estate of Marcel J. Rougeron—This is an application by a person claiming to be an acknowledged son of the decedent for an order vacating this court's decree of May 17, 1957, admitting his father's will to probate. That decree recited the fact that the present petitioner's objections to the probate of the propounded instrument had been dismissed by an order dated March 19, 1957, upon the ground that he had been found as a matter of law to have no interest in the estate (*Matter of Rougeron*, N. Y. L. J. March 11, 1957).

Following the filing of the answer of the administrator c.t.a. the movant on this application abandoned his attack upon the decree admitting the will to probate stating in the memorandum submitted by him in reply to the brief of the respondent, "The entirety of our Main Memorandum dealt with one issue only. As set forth in our Conclusion, we ask this Court to 'vacate, set aside and nullify the decree of December 2, 1958.' This is the decree of *distribution* entered nearly two years after the disputed probate. We made it unanswerably clear in the Main Memorandum that *we make no attack whatever on the decree of probate of May 16, 1957*. We are satisfied that the decree of probate was proper. We attack in this proceeding *only* the decree of *distribution* and only the adjudication of the *devolution* of that property which had its situs in Switzerland on date of death. (See Main Memo., pages 89-91.)" (Italics in original.)

The decree of December 2, 1958, had settled the account of the administrator c.t.a. in a proceeding instituted for the purpose without notice to the moving party.

The court will address itself to the merits of the petitioner's application and overlook the fact that the relief that he now seeks represents a total change of position from that which he had originally assumed in initiating this proceeding bearing the caption "in the matter of the application to open, vacate, and set aside a decree of this court granting letters of administration with the will annexed."

The petitioner states it to be his present purpose to invoke the Swiss United States Treaty of 1850 said by him to confer exclusive control over the personal property left by the decedent upon the courts of its situs which he asserts to be Switzerland, thus ousting this court of the jurisdiction it had exercised in making the decree directing distribution.

The state of the record of the administration of this estate being what it is, however, it is perfectly obvious that the moving party is barred by the decree of May 16, 1957, and the order of March 19, 1957, from invoking the jurisdiction of this court to set aside the decree entered in the proceeding for the settlement of the account in the administrator c.t.a. Having allowed the decree which held him to be without any interest in this estate to become final without appeal, the petitioner was obviously incapable of objecting to the account of the fiduciary filed thereafter. In apparent recognition of the situation the administrator c.t.a. in the proceeding for the settlement of its account quite properly omitted to cite the moving party as a respondent for the question of his right to participate in matters affecting the estate had already been clearly resolved against him. Lacking any interest in the estate he is not now entitled to an order setting aside and nullifying the decree settling the account. A situation almost identical to that here confronted Mr. Surrogate Delehanty in *Matter of Edward W. Browning* (N. Y. L. J., Sept. 1, 1939). There an attempt was made by the adopted daughter of the decedent's first wife to interpose objections to the account.

It had previously been held in the proceeding for probate of his will that the claimant had no interest in the estate of the decedent. The court said on a motion to dismiss her objections in the accounting proceeding, "It was obvious that her position as objectant in the accounting was untenable since she was barred by the decree theretofore entered. Accordingly, her objection was dismissed as matter of law" (see also *Matter of Browning*, 153 Misc. 564).

Section 262 of the Surrogate's Court Act prescribes the persons who must be cited on a proceeding for the settlement of the account of a fiduciary in this court. Neither in that section nor in Section 259 which lists the persons who may institute a proceeding for a compulsory accounting is there to be found any authority which would permit the moving party to have intervened in the accounting which resulted in the decree he attacks in his memorandum. The principle is illustrated in *Matter of McGoughran* (124 App. Div. 312 [1st Dept.]), in which objections to the account of the administrator interposed by a woman claiming to be the widow of the decedent were dismissed for the reason that her status had theretofore been denied on her application to vacate the decree granting letters of administration. The Appellate Division adopting the reasoning of the court below cited the Surrogate's decision in its own opinion at page 315 stating: "The issue as to whether the objectant was the widow of the decedent was tried before me and was determined adversely to her contentions in the proceeding in this court commenced by her to set aside letters of administration granted on a petition which alleged that he died unmarried. My decree made in that proceeding was a final decree in a special proceeding and not the mere decision of a motion and it operated as a bar and an estoppel on her."

It is not to be thought that the movant is deprived by the ruling here made of the opportunity that had been his to challenge the court's jurisdiction which he had

initially attacked in the probate proceeding. He failed to appeal from the decree which denied him the relief he then sought and having been found to be without any interest in this estate he will not now be "permitted to involve * * * (the) estate in expensive litigation upon a bare assertion of interest" (*Matter of Aims*, 199 Misc. 188). To like effect see *Matter of Cullen* (163 Misc. 410 [Delehanty, S.]); *Matter of Crum* (98 Misc. 160, 180); *Matter of Sherman* (134 N. Y. S. 2d 399); *Matter of Goldsticker* (192 N. Y. 35, esp. at p. 41), where it was said: "Of course, if a decree cannot be assailed in any other tribunal equally it cannot be assailed in a different litigation before the same tribunal" (*Matter of Donaldson*, 165 Misc. 661; *Matter of Leverich*, 135 Misc. 774; *Matter of Cook*, 244 N. Y. 63; *Matter of Cohen*, 12 Misc. 2d 784). For the reasons stated and upon the authority of the cases cited this application, whether it be regarded as a motion to reopen the decree of May 16, 1957, admitting the will to probate, the order of March 19, 1957, dismissing the objections of the moving party as a person not interested in the estate, or the decree dated December 2, 1958, settling the intermediate account of the administrator c.t.a., is in all respects denied. Submit order on notice.

At a Surrogate's Court, held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City, County and State of New York, on the 31st day of May, 1966

PRESENT: HON. S. SAMUEL DIFALCO

SURROGATE

(Filed June 6, 1966)

File No. P1396-1955

In the Matter of the Application to open, vacate and set aside a Decree of this Court granting Letters of Administration with the Will annexed of the Estate of Marcel J. Rougeron, Deceased.

Order on Remittitur

An appeal having been taken to the Court of Appeals in the State of New York from an order of the Appellate Division of the Supreme Court in and for the First Judicial Department, made on July 8, 1965, and entered on said date in the office of the Clerk of said Appellate Division, which unanimously affirmed the order of the Surrogate's Court, New York County, made on May 24, 1963, and entered on May 28, 1963, in the office of the Clerk of said Surrogate's Court;

And the matter having thereafter duly come on to be heard and argued before the Court of Appeals of the State of New York, and an order having been duly made and entered by said Court on May 5, 1966, dismissing the appeal from said order of said Appellate Division for non-finality, insofar as it affirms the said order of the said Surrogate's Court denying the application to vacate the probate decree, and in all other respects affirming said order of said Appellate Division, with costs, and a certified copy of said order of said Court of Appeals, together with the papers upon which the said appeal was heard, having been duly transmitted to this Court and filed on May 16, 1966;

Now, on motion of Kelley Drye Newhall Maginnes & Warren, attorneys for the respondent Jeanne A. Rougeron, it is

ORDERED, ADJUDGED AND DECREED that the order of the Court of Appeals of the State of New York, made and entered, as aforesaid, on May 5, 1966, dismissing the order of the Appellate Division of the Supreme Court appealed from, insofar as it affirms the order denying the application to vacate the probate decree, and in all other respects affirming said order of said Appellate Division, be and the same hereby is made the order of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the respondent, Jeanne A. Rougeron, recover from the petitioner, Jules Jean Rougeron, costs to be taxed in the amount of $570.73.

S. SAMUEL DIFALCO
Surrogate

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IN THE

Supreme Court of the United States

October Term, 1966

No. 386

IN THE MATTER OF

THE APPLICATION TO OPEN, VACATE AND SET ASIDE A DECREE OF THE SURROGATE'S COURT GRANTING LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED ON THE ESTATE OF MARCEL J. ROUGERON,

Deceased,

JULES JEAN ROUGERON,

Petitioner-Petitioner,

against

JEANNE A. ROUGERON,

Respondent-Respondent.

On Petition for Writ of Certiorari to the Court of Appeals State of New York

BRIEF IN OPPOSITION

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INDEX

	PAGE
OPINIONS BELOW	1
QUESTION PRESENTED	2
NATURE OF THE CASE	2
ARGUMENT	
I—Petitioner litigated to a concededly final determination the question of whether he has an interest in this estate in the first New York proceeding. He argued the treaty in that proceeding. The fact that he seeks now to urge another interpretation of that same treaty does not give him the right to relitigate. Nor does it raise a federal question, *res judicata* being an adequate state ground for decision	11
II—There is nothing wrong or novel in the decisions below that the entire estate passed to the widow pursuant to the express terms of the will	19
CONCLUSION	28

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Baldwin v. Iowa State Travelling Men's Assn., 283 U. S. 522, 525 (1931)	13
Matter of Barandon, 41 Misc. 380 (Surr. Ct., N. Y. Co., 1903)	25
Matter of Batsholts, 188 Misc. 807 (Surr. Ct., N. Y. Co., 1946)	24

PAGE

Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 29-30 (1917) 13
Consol. Turnpike v. Norfolk etc. Ry. Co., 228 U. S. 596, 599 (1913) 18
Cromwell v. County of Sac, 94 U. S. 351, 353 (1876) 13
Cuyahoga Power Co. v. Northern Realty Co., 244 U. S. 300, 303-304 (1917) 18

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Ennis v. Smith, 55 U. S. 251, 265 (1852) 24
Enterprise Irrigation District v. Canal Co., 243 U. S. 157, 163-164 (1917) 17, 18
Eustis v. Bolles, 150 U. S. 361, 366 (1893) 17

Matter of Fabbri, 2 N. Y. 2d 236, 239 (1957) 21, 24
Forsyth v. Hammond, 166 U. S. 506, 517-518 (1897) 13
Fox Film Corp. v. Muller, 296 U. S. 207, 210-211 (1935) 17

Garr, Scott & Co. v. Shannon, 223 U. S. 468, 470 (1912) 17
In re Gemeinde Feldis, 24 B. E. [1] 312 (1898) 25

Hale v. Lewis, 181 U. S. 473, 479-480 (1901) 17
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Lynch v. New York, 293 U. S. 52, 54-55 (1934) 17, 18

Mental Hygiene Dept. v. Kirchner, 380 U. S. 194, 198 (1965) 17
Moran v. Horsky, 178 U. S. 205, 215 (1900) 17
Morris v. Jones, 329 U. S. 545 (1947) 14

PAGE

Northern Pac. R. Co. v. Ellis, 144 U. S. 458, 464 (1892) 17
In re Nussle, 43 B. E. [1] 77 (1917) 25

Pierce v. Somerset Railway, 171 U. S. 641, 648 (1898) 17

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Reed v. Allen, 286 U. S. 191, 193, 199 (1932) 13

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Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N. Y. 304, 307 (1929) 13
Stembridge v. Georgia, 343 U. S. 541, 547-548 (1952) 18
Stoll v. Gottlieb, 305 U. S. 165, 172 (1938) 13

Walter A. Wood Co. v. Skinner, 139 U. S. 293 (1891) 17
Wilkins v. Ellett, 76 U. S. 740, 741-742 (1869) 24
Williams v. North Carolina, 325 U. S. 226, 230 (1945) 13
In re Wohlwend, 9 B. E. 507 (1883) 25

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American-Swiss Private Law, 47 Col. L. Rev. 186, 195 (1947) 21
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IN THE

Supreme Court of the United States

October Term, 1966

No. 386

IN THE MATTER OF

THE APPLICATION TO OPEN, VACATE AND SET ASIDE A DECREE OF THE SURROGATE'S COURT GRANTING LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED ON THE ESTATE OF MARCEL J. ROUGERON,

Deceased,

JULES JEAN ROUGERON,

Petitioner-Petitioner,

against

JEANNE A. ROUGERON,

Respondent-Respondent.

On Petition for Writ of Certiorari to the Court of Appeals State of New York

BRIEF IN OPPOSITION

Opinions Below

The opinion of Surrogate DiFalco denying the petition of petitioner herein to open, vacate and set aside decrees of the Surrogate's Court on the ground that petitioner had

already adjudicated the question of whether he had an interest in this estate is printed in the record below (A6-9)* and is reported in the New York Law Journal of February 4, 1963, at pp. 16-17. The subsequent affirmances by the Appellate Division (First Department) and by the Court of Appeals are reported in 24 AD 2d 705 and 17 NY 2d 264 respectively. Each of these decisions is set forth in the Appendix to the petition for certiorari herein.

Question Presented

Whether petitioner is to be permitted to relitigate his claim of an interest in this estate, which claim he concededly litigated to a final determination prior to the institution of the present proceeding?

More specifically, where petitioner in the prior Surrogate's Court proceeding—long since final—urged as the basis of his claim the Swiss-American Treaty of 1850, may he relitigate in a second proceeding in the same Surrogate's Court the very same question of whether he has an interest in this estate, solely because he has now changed his theory as to the meaning of that treaty?

We submit that the answer is "no"—as each of the three courts below have held.

Nature of the Case

This is a dispute as to who is entitled to the estate of Marcel J. Rougeron: his widow, to whom he bequeathed his entire estate by a will now concededly validly admitted to probate in New York, or an illegitimate son who asserted his claim in a prior proceeding and now attempts to

* References are to the Appendix in the court below.

relitigate his claim in a second proceeding in which the present petition for certiorari is filed.

The decedent, a citizen of the United States, domiciled in the State of New York, died in Switzerland on April 15, 1954 leaving a will in which he named his wife of many years, the respondent herein, his sole heir to receive his entire estate (A34-35, 44-45, 54, 244). The decedent's property consisted of funds in a number of banks in New York City (where decedent had lived and worked for almost half a century) and in a Swiss bank, stocks in four United States corporations, some American Express Company traveler's checks and a check on the Royal Bank of Canada (A234-236, 210-212). Some of the stock certificates were held by a New York bank and the rest were with the decedent and his wife in Switzerland (A180-182, 252).

In 1903, in France, the decedent had fathered the petitioner herein and, according to petitioner, acknowledged him to be his illegitimate child (A233). Petitioner has always been a resident and citizen of France (A204, 205, 222). Decedent married respondent in Illinois in 1937. When he died, she was 73 years old; today she is 86 years old. Petitioner has claimed a share in decedent's estate, contrary to the terms of decedent's will. Petitioner has litigated this single issue in Switzerland, in France and, now, this lawsuit is the second time in 12 years that he is litigating it in this country.*

* In this 12 year period, petitioner has never verified a pleading. Four different attorneys-in-fact have acted for him in this country alone, through seven different lawyers or law firms. His present attorney has never come forward with proof that he is the attorney-in-fact.